BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAVID L. DUNHAM Claimant VS. **DUKE DRILLING CO., INC.** Respondent AND **LIBERTY INSURANCE CORP.** Insurance Carrier	)	Docket No. 1,061,392

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the January 13, 2014, preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore. Scott J. Mann of Hutchinson, Kansas, appeared for claimant. Kendra M. Oakes of Kansas City, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found claimant entitled to medical care for his fractured hip, with Dr. Klumann designated as the authorized treating physician. The ALJ ordered temporary total disability benefits paid at the previous rate from November 15, 2013, until claimant is released to return to work and has been offered accommodated work within temporary work restrictions, has attained maximum medical improvement, or until further order of the court. Further, the ALJ found medical expenses incurred to date for treatment of claimant's fractured hip are to be paid as authorized medical expenses.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the December 17, 2013, Preliminary Hearing and the exhibits; and the transcript of the December 10, 2013, evidentiary deposition of claimant, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues claimant's November 1, 2013, injury occurred following a fall at home and did not arise out of and in the course of claimant's employment with respondent as deliberately and plainly defined by the Kansas legislature. Respondent maintains

claimant's November 2013 fall is not a natural and probable consequence of his original compensable injury; furthermore, respondent states the "natural and probable consequence rule" has no statutory basis.[1] Moreover, respondent argues whether claimant fell because of a weakened knee is not determinative because his current disability and need for treatment results from a new and separate accident to a new part of the body.

Claimant contends Kansas law does not require him to prove that a secondary injury also arose out of and in the course of employment. Additionally, claimant maintains the uncontroverted medical evidence links his fall at home to his compensable leg injury, and thus the resulting left hip fracture is a natural and direct consequence of his primary work-related injury.

The issues for the Board's review are:

1. Did the ALJ exceed his authority and/or jurisdiction in granting benefits to claimant?

2. Did claimant's November 1, 2013, injury arise out of and in the course of his employment with respondent?

FINDINGS OF FACT

Claimant suffered a compensable injury to his left femur and knee on December 13, 2011, when a large piece of metal hit claimant on the back of the left thigh while working for respondent on an oil rig. Claimant sustained a fracture to the left femur as a result of the accident.

Dr. Erik L. Severud, an orthopedic physician, treated claimant for his left femur injury, eventually installing an intermedullary rod. Claimant testified he noticed problems with his left knee once he was able to ambulate following the injury. Claimant explained when he tries "to put a little weight on [the left knee], it kind of wants to go backwards and then pop forward, like it doesn't want to work."[2]

Claimant complained of his left knee problems to Dr. Severud, who examined the knee and recommended treatment. Dr. Severud performed a knee arthroscopy on October 1, 2012. Claimant continued to follow up with Dr. Severud following the October 2012 knee surgery, and he continued to have constant pain in his left knee and left upper leg. Dr. Severud restricted claimant to sedentary work and therapy with home exercises. Claimant discontinued formal physical therapy following his October 2012 knee surgery.

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[1] Respondent's Brief (filed Feb. 6, 2014) at 2.

[2] P.H. Trans. at 12.

On February 5, 2013, claimant fell at his home after his left knee hyperextended and buckled, causing claimant to fall to the ground:

> . . . I was getting water out of the icebox, and I didn't have the door open, and I leaned back a little bit and my knee gave out on me and down I went, and basically landed straight down on my leg, and then I fell over.[3]

Claimant was using a crutch at the time of his February 2013 fall. He returned to Dr. Severud on February 14, 2013, who ordered an MRI of the left knee. The MRI revealed a patella fracture and a partial patellar tendon tear, findings that were "consistent with known condition of the knee."[4] Claimant stated Dr. Severud did not recommend surgery or therapy on the knee other than claimant's current treatment. Claimant testified his knee condition "pretty much stayed the same."[5] He indicated his soreness went away to some extent, but "as far as the buckling and wanting to hyperextend, it's still there."[6] Claimant eventually began using a cane instead of crutches, claiming the crutch hurt his shoulder. Claimant discussed his cane use with Dr. Severud, and Dr. Severud told him to use the cane at all times.

Claimant continued to treat with Dr. Severud until July 25, 2013, when he released claimant at claimant's request. Dr. Severud indicated claimant was at maximum medical improvement, as he "has been at a plateau for several months."[7] He did not expect a significant improvement in function over time, and determined claimant may need surgery in the future to address the fact claimant's femur had not fully healed. Dr. Severud referred claimant to Dr. Bradley Dart to examine the left femur.

Dr. Dart examined claimant on two occasions. In a note dated July 9, 2013, Dr. Dart indicated claimant's left femur fracture was at maximum medical improvement. Further, Dr. Dart noted claimant had full range of motion with flexion and extension of the left knee, though claimant complained of some knee pain. Dr. Dart recommended claimant return to Dr. Severud "if his knee continues to bother him and he would like to get treatment."[8] Dr. Dart noted claimant is to bear weight as tolerated with no restrictions.

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[3] *Id*. at 15.

[4] P.H. Trans., Cl. Ex. 3 at 1.

[5] P.H. Trans. at 16.

[6] *Id*.

[7] P.H. Trans., Resp. Ex. B at 3.

[8] P.H. Trans., Cl. Ex. 2 at 1.

Claimant testified Dr. Dart suggested operating on claimant's femur by removing the intermedullary rod and installing plates, but claimant declined. Claimant stated he wanted to continue use of a bone stimulator to see if his condition would improve. Claimant testified Dr. Dart thought he saw a little improvement in claimant's condition at his follow up appointment. Claimant did not see any doctors for treatment of his left leg or left knee after he was released by Dr. Severud on July 25, 2013.

Dr. C. Reiff Brown examined claimant at his counsel's request on August 9, 2013, for purposes of an independent medical examination. Dr. Brown reviewed claimant's history and medical records and performed a physical examination. Dr. Brown opined:

> In my opinion, [claimant] does not need additional active treatment at this time however he needs to continue the medications that have been prescribed for him and certainly if a change in symptoms occurs he should be back in touch with [Dr. Severud or Dr. Dart].[9]

Using the AMA *Guides*,[10] Dr. Brown determined claimant sustained a combined 61 percent permanent partial impairment of function to the body as a whole. He concluded claimant is permanently totally disabled and imposed permanent restrictions. Dr. Brown opined future additional medical treatment was necessary. Dr. Severud, also using the AMA *Guides*, rated claimant with a combined 33 percent permanent partial impairment to the left lower extremity on September 5, 2013, for residual pain and incomplete healing of the femur fracture.

On November 1, 2013, claimant again fell at his home, landing on his left hip. Claimant testified:

> Well, I was – woke up to go to the bathroom, and I was headed to the bathroom and I didn't make it quite to the bathroom, and there's a threshold, when my knee gave out on me I fell on the threshold, which is about, I don't know, maybe an inch. But that's what I landed on.[11]

Claimant explained this occurred between approximately 6:30 a.m. and 7:30 a.m. that morning. Once he fell, he stated he lay there for maybe 30 minutes before crawling to his bed and calling his friend Tony Rocha. Mr. Rocha testified he arrived at claimant's house at approximately 6:45 a.m. after leaving a car wash where he works. Mr. Rocha stated claimant was in considerable pain and requested a ride to the hospital, but claimant

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[9] P.H. Trans., Cl. Ex. 1 at 4.

[10] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[11] P.H. Trans. at 21.

could not be moved. Mr. Rocha left claimant's home to take his grandchild to school, and upon his return, called 911 for an ambulance.

Great Bend Fire Department Emergency Medical Services (EMS) personnel arrived on the scene at 7:45 a.m. The incident report indicated claimant was walking to the bathroom at 3:30 a.m. and "caught his foot on a step and fell, hurting his hip in the process."[12] Claimant denied this happened, explaining the only steps in his home go upstairs and downstairs, and the fall occurred later in the morning when his left knee buckled. Claimant admitted he may have told EMS he had tripped on a step, but he does not remember because he was in a lot of pain at that time. Claimant insisted he did not trip on a step, but instead fell when his knee buckled.

Claimant traveled by ambulance to Great Bend Regional Hospital, where he was then transferred to Via Christi Hospital St. Francis in Wichita, Kansas (Via Christi). Claimant does not recall being admitted to Great Bend Regional Hospital, nor does he remember anything other than being transferred to another ambulance for the travel to Via Christi. En route, claimant had an allergic reaction to medication he was given, which is "basically the last I remember."[13]

Upon arrival at Via Christi, claimant was admitted and underwent a left hip replacement surgery with Dr. Michelle Klaumann on November 2, 2013. Records indicate claimant sustained a femoral neck fracture, and Dr. Klaumann performed an extraction of the left femoral nail and left hip endoprosthesis. Claimant suffered additional medical problems while in the hospital and was not discharged until November 15, 2013, at which time Dr. Klaumann restricted claimant to toe-touch weightbearing to the left lower extremity. Dr. Klaumann indicated claimant is to use a walker for ambulation.

In a letter to claimant's counsel dated December 23, 2013, Dr. Severud submitted a causation opinion regarding claimant's November 1, 2013, fall and fractured left hip:

> In my opinion, [claimant] consistently reported his left knee "giving out" and weakness following his work related injury. He had a fall at home on 02/05/13, which he reported was caused by his left knee buckling. As such I think it is likely that his left knee was in a weakened stated [*sic*], having not fully healed from the original work injury, and that this is the likely cause of his falls at home, both on 02/05/13 and 11/01/13. In other words, "but for" his work injury to his left leg and knee, it is likely he would not have fallen at home on these two occasions.[14]

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[12] P.H. Trans., Resp. Ex. C at 2.

[13] P.H. Trans. at 28.

[14] Severud Report (Dec. 23, 2013) at 2.

Claimant has not worked for wages or received any monetary benefit since November 1, 2013. Claimant is not receiving Social Security Disability benefits or unemployment benefits. Claimant has no health insurance, including Medicare or Medicaid. Claimant currently takes prescribed pain medication and uses a wheelchair. He testified he can tolerate the walker for approximately 10 to 15 minutes before he returns to the wheelchair.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b(c) states: "The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record."

K.S.A. 2011 Supp. 44-508(h) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."

In *Jackson v. Stevens Well Service,*[15] the Kansas Supreme Court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syl. ¶ 1.)

The secondary injury rule allows an injured employee to receive compensation for all of the natural consequences arising out of an injury, including any new and distinct injury that is a direct and natural result of the primary injury.[16] However, compensation is not warranted when the increased disability resulted from a new and separate accident.[17]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[18] Moreover, this review of a

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[15] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

[16] See *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 515, 154 P.3d 494 (2007).

[17] See *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973); *Logsdon v. Boeing Co.*, 35 Kan.App.2d 79, 85, 128 P.3d 430 (2006).

[18] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[19]

ANALYSIS

1. Did the ALJ exceed his authority and/or jurisdiction in granting benefits to claimant?

K.S.A. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment, the payment of medical compensation, and the payment of temporary disability compensation. K.S.A. 44-534a also specifically gives the ALJ authority to grant or deny the request for medical compensation pending a full hearing on the claim. The ALJ was acting within his jurisdiction and authority to order medical and temporary total disability benefits.

2. Did claimant's November 1, 2013, injury arise out of and in the course of his employment with respondent?

Respondent first asks the Board to reject the natural and probable consequence rule. The Board is duty-bound to follow precedent of our appellate courts.[20] Until directed otherwise, this Board Member will interpret the natural and probable consequence rule as directed by the Supreme Court in *Jackson*.[21]

Respondent submits that the hip injury arising out of claimant's November 1, 2013, accident was not the natural and probable consequence of the original injury. Claimant testified that on November 1, 2013, his left knee gave out causing him to fall and fracture his hip. An advanced practice registered nurse at Great Bend Regional Hospital, on November 1, 2013, wrote claimant thought his knee gave out. Claimant had a history of hyperextending his knee.[22] In his report dated December 23, 2013, Dr. Severud confirmed claimant had consistently reported his left knee giving out.

Dr. Severud thought, when claimant was released with permanent restrictions, he was considered a "fall risk." Dr. Severud wrote:

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[19] K.S.A. 2012 Supp. 44-555c(k).

[20] See *Sager v. Delivery Logistics, Inc.*, No. 1,043,908, 2013 WL 1384372 (Kan. WCAB Mar. 15, 2013); *Johnson v. J&J BMAR Joint Ventures*, LLP, No. 1,012,089, 2005 WL 3407992 (Kan. WCAB Nov. 22, 2005).

[21] 208 Kan. 637.

[22] P.H. Trans. at 20.

> I think it is likely that his left knee was in a weakened stated [*sic*], having not fully healed from the original work injury, and that this is the likely cause of his falls at home, both on 02/05/13/ and 11/01/13. In other words, "but for" his work injury to his left leg and knee, it is likely he would not have fallen at home on these two occasions.[23]

Dr. Severud's medical opinion is uncontroverted. Uncontroverted evidence may not be disregarded and is generally regarded as conclusive absent a showing it is improbable or untrustworthy.[24]

CONCLUSION

The ALJ did not exceed his authority and/or jurisdiction in granting benefits to claimant. Claimant's November 1, 2013, injury was the natural and probable consequence of his December 13, 2011, injury and arises out of and in the course of his employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated January 13, 2014, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March 2014.

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HONORABLE SETH G. VALERIUS
BOARD MEMBER

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Bruce E. Moore, Administrative Law Judge

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[23] Severud Report (Dec. 23, 2013) at 2.

[24] See *Anderson v. Kinsley Sand & Gravel*, Inc., 221 Kan. 191, 558 P.2d 146 (1976).